No. 82-331

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1982

STATE OF NEW MEXICO AND HAROLD F. OLSON, Individually and as Director, New Mexico Department of Game and Fish,

Petitioners,

v.

MESCALERO APACHE TRIBE,

Respondent.

BRIEF OF THE STATE OF ARIZONA, ARIZONA GAME AND FISH COMMISSION, AND THE STATE OF WASHINGTON DEPARTMENT OF GAME AS AMICI CURIAE

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BRIEF OF THE STATE OF ARIZONA, ARIZONA GAME AND FISH COMMISSION, AND THE STATE OF WASHINGTON DEPARTMENT OF GAME AS AMICI CURIAE

The State of Arizona and the Arizona Game and Fish Commission ("Arizona") respectfully submit this brief as amici curiae.[1]

INTEREST OF AMICI CURIAE

This case raises issues which materially affect Arizona's resource management interests. Arizona's interests parallel those of New Mexico, and of many other western states. At stake is the ability of a state to engage in comprehensive management of a constantly evolving and fluid natural re-

[1] Consent from the parties is not required pursuant to S.Ct.R. 36(4).

source, the fish and game found within a state's border.[2] This case also presents the stark contrast between a tribe's use of wildlife to generate revenue and a state's management of wildlife for the benefit and preservation of its citizens, present and future.

This case will also have an impact on Arizona's pending litigation. *White Mountain Apache Tribe v. State of Arizona*, No. CIV-77-867-PHX-WPC, (D. Ariz. Nov. 9, 1977), is awaiting trial before the United States District Court for the District of Arizona following a remand by the Ninth Circuit Court of Appeals in *White Mountain Apache Tribe v. State of Arizona*, 649 F.2d 1274 (1981).

This brief will address the issues as set forth in New Mexico's petition for writ of certiorari.[3]

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[2] To exemplify the impact this case will have on Arizona is the fact that Indian reservations, seventeen in all, comprise nearly twenty-seven percent of the total land mass of Arizona. In the State of Washington, there are twenty-four Indian reservations, many of which include large "fee" (non-Indian) land ownership. The number of reservations in Washington is increasing with the most recent new reservation proclaimed by the United States Department of the Interior regulation in 1982. Sauk-Suiattle Reservation, 47 F.R. 26243, 27 May 1982. Such an action, the creation of a new reservation, cannot deprive a state of jurisdiction over its citizens and its resources. Other western states are faced with similar problems in regard to substantial numbers of Indian reservations contained within their borders.

[3] This brief will not discuss the issue regarding the treaty. We support, however, New Mexico's position on that issue.

ARGUMENT

I. THE DECISION OF THE TENTH CIRCUIT IS NOT IN HARMONY WITH THIS COURT'S DECISION IN MONTANA v. UNITED STATES, 450 U.S. 544 (1981).

The decision below, *Mescalero Apache Tribe v. State of New Mexico*, 677 F.2d 55 (1982), egregiously expands the import of tribal sovereignty as defined in the Court's decisions.

There is no question that Indian tribes "return inherent sovereignty over their own reservation in matters concerning self government and internal relations". *Montana v. United States, supra,* and *Merrion v. Jicarilla*, 71 L.Ed. 21 (1982). The peculiar constitutional status of tribes and the concomitant federal responsibility in relation to those tribes requires this result when only Indians are involved. While limiting tribal criminal jurisdiction to tribal members only, *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978), this Court has allowed for the exercise of tribal civil regulatory jurisdiction as against non-Indians engaging in activity on a reservation. But, like all other constitutional rights, tribal sovereignty is not absolute. It may be abrogated by Congress. *United States v. Mazurie*, 419 U.S. 544 (1975). It may not be exercised if inconsistent with a tribe's dependent status. *Oliphant, supra.* Finally, it is not an absolute bar to the exercise of state laws on a reservation. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Kahn v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

Thus, although sovereignty forms an important backdrop in resolving the jurisdictional dispute present herein, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), it is not the controlling factor.

The strength of a tribe's ability to control and govern pursuant to the concept of sovereignty is diluted when the activity involves non-Indians. For example, the tribe's governing authority diminishes, as applied to non-Indians, as a

result of the tribe's dependent status. Moreover, when the tribe enters the field of economic competition for a certain market, it does so on equal footing with other governmental entities. If it were otherwise, a tribe could simply sell its particular immunity from state taxation to non-Indians with impunity.

The decision of the Tenth Circuit erroneously holds that tribal sovereignty is the overriding consideration when determining the tribe's ability to control non-Indian activity. Apparently, the Tenth Circuit reads *Montana, supra,* as holding that on land held in trust or owned by the tribe, the tribe has an absolute right to govern all activity, Indian and non-Indian. Nothing in *Montana, supra,* supports such a simplistic view. The mere fact that non-Indian activity takes place on a reservation does not insulate the activity from state regulation. As the District Court in *Mescalero Apache Tribe v. O'Chesky,* 439 F.Supp. 1063 (1977), *aff'd,* 625 F.2d 967 (10th Cir. 1980), *cert. denied,* 450 U.S. 959 (1981), *rehearing denied,* 102 S.Ct. 1296 (1982), so cogently noted:

> The Mescalero Reservation is not located by itself on another planet. It is situated in New Mexico. . . .

439 F.Supp. at 1072-73.

The decision below also misconstrues fish and game as resources identical with oil and gas. The Court's reliance on *Merrion, supra,* is inappropriate. In *Merrion,* the question was whether a tribal tax on non-Indian oil and gas leases was permitted by tribal sovereignty or as an aspect of the tribe's power to exclude people from the reservation. Neither raised nor decided was the power of the state to tax the same activity.

The Court focused on the right of a tribe to manage *its resources* for economic return. Clearly, fish and game are not the same as oil and gas.

In addition to misconstruing *Merrion, supra*, the Tenth Circuit decision does not apply the particularized inquiry called for in *Bracker, supra*. When that inquiry is made, we contend that a sufficient state interest exists to justify both the state fishing license requirement and the imposition of state regulations on the non-Indian conduct.

II. THE MESCALERO FISHING PROGRAM.

A. The Tribal Interest.

In the instant case, the United States Fish and Wildlife Service, pursuant to a cooperative agreement with the tribe, provides fish for stocking of the reservation waters. (Mescalero Apache Brief in Opposition, Appendix, page 12A). These fish are then taken from tribal waters by non-Indian fishermen.

The Mescalero fishing program is designed to generate income for the tribe. In this case, the fish are analogous to cigarettes. In *State of Washington v. Confederated Tribes of the Coville Reservation*, 447 U.S. 134 (1980), ("*Coville cigarette case*"), this Court noted:

> All three tribes use federally restricted tribal funds to purchase cigarettes from out of state dealers. The tribes distribute the cigarettes to the tobacco outlets and collect from the operators of these outlets both the wholesale distribution price and a tax of forty to fifty cents per carton.

447 U.S. at 144.

In this case, the tribe is more fortuitous. It does not have to purchase fish from out of state dealers. The tribe obtains fish, without cost, from the federal government. The tribe distributes the fish to various lakes on the reservation. Although in error, apparently the tribe and the Tenth Circuit, view the fish as the property of the tribe until the sale, which is the time they are caught by the non-Indian fishermen.

There are lakes outside the boundaries of the Mescalero Reservation in which the same type of fish may be caught. Thus, what the tribe offers to non-Indian fishermen and what is unavailable elsewhere in the State of New Mexico is an exemption from having to pay a state fishing license fee, in essence selling its Indian immunity from state taxation to non-Indians.

In the Coville cigarette case, this Court condemned tribal attempts to sell this form of Indian immunity:

> What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing customers [sic] from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

447 U.S. at 155.

Because a tribe is not permitted to open a shopping center, which could be equivalent in size to a lake, with the purpose and effect of luring non-Indians in by the bait of a tax exemption, there is no basis for the tribe to do the same through the guise of a fishing program. This position does no violence to the concept of sovereignty. It merely reflects this Court's holding that a tribe is not entitled to a guaranteed share of a market. *Coville cigarette case, supra.*

B. The Federal Interest.

The federal government provides the fish to the tribe for stocking of lakes as well as performing water quality and habitat management functions. However, the federal gov-

ernment does not regulate the taking of the fish or the licensing fees. Thus, it provides technical assistance, but does not regulate directly or indirectly the non-Indian activity. The federal interest is minimal at best.

State regulation of the taking of fish in no way impedes the federal interest in making a tribe economically self-sufficient. The tribe is free to set its own fishing fees. Nor does state regulation of taking of fish impede the federal policy of providing technical assistance to a tribe.

C. The State Interest.

New Mexico has an interest, as a sovereign state, in regulating non-Indian conduct within its borders. Moreover, it provides the full panoply of governmental services to those people traveling, in the state, to and from the reservation. *Mescalero v. O'Chesky, supra*, 439 F.Supp. at 1073.

New Mexico does not provide the tribe with fish for tribal lakes. The fish come from a federal fish hatchery. This fact is misconstrued as a lack of significant state involvement. In order for New Mexico to demonstrate its interests in this area, it would be necessary for the state to duplicate the efforts of the federal government stocking the same lakes. It is inconceivable that New Mexico would have to engage in a wasteful duplication of money and activity to substantiate an interest in the non-Indian activity. The state's interest, as a sovereign, in regulating non-Indian conduct within its borders should not be diminished for a sound allocation of resources.[4]

III. GAME.

In utilizing the term "game", we refer to elk, antelope, deer, big-horn sheep, wild turkey, bear, and lion. A state's interest in game has unfortunately been defined in the con-

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[4] Washington is a state that plants fish which migrate to and through its reservations. Arizona plants fish in waters adjacent to the reservation.

text of "migration". That term has a technical meaning and generally refers to seasonal movement of game. However, the state's conservation interest is equally implicated by daily movement.

Seasonal movement of game is influenced by a variety of factors including severity of winter, availability of forage, availability of water, population pressures, and/or predators.

For example, elk and deer in the face of heavy winter snows will move from higher elevations to lower elevations. In some instances, that seasonal movement will be from on to off reservation or off to on reservation. However, if snowfall at higher elevations is moderate to light, and therefore the food supply at the higher elevation is adequate, the state does not lose its interest in that game in a year when the seasonal migration is not marked.

To the extent that the state's regulatory interest is contingent upon migration of game, that term must also be construed to include daily movement. Elk, deer, lion, and bear may have substantial daily ranges in terms of their search for food. In both instances, seasonal migration and daily movement, the state's management of that particular game species when off the reservation obviously implicates and affects the viability of that species when it is found on

the reservation.[5] A more difficult question arises when a state has introduced a game species onto a reservation in an area where it does not move on or off the reservation. Even if introduction of the species took place thirty years ago, the state retains an interest in that game. Game exists within an eco system. Eco systems do not respect cartographer's lines on maps or arbitrarily defined political jurisdictional lines. Animals do not move towards a fence boundary which divides a piece of land that is the same on both sides and contemplate whether they are tribal or state game. In this case, the record reflects sufficient game movement to establish New Mexico's interest in regulating non-Indian hunting.

IV. THE TENTH CIRCUIT ERRED WHEN IT CONCLUDED THAT STATE REGULATION OF NON-INDIAN HUNTING AND FISHING ON THE MESCALERO RESERVATION HAD BEEN PREEMPTED BY FEDERAL STATUTORY ENACTMENTS.

The decision on remand focused on the New Mexico Enabling Act, 36 Stat. 557 (1910), the Indian Reorganization Act of 1934, 18 U.S.C. §461, *et seq.*, P.L. 280, 28 U.S.C. §1162 (B), and extensive federal developmental assistance

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[5] We do not necessarily believe that migration and/or daily movement constitute a very sound basis for determing the state's regulatory interest. However, it is the standard imposed on Arizona by its Circuit Court of Appeals in *White Mountain Apache Tribe v. State of Arizona*, 649 F.2d 1274 (9th Cir. 1981). Regardless, no standrad exists for determining the percentage of a game population that must move, daily or seasonally, to justify state regulation. The movement of even small numbers of a species may materially affect long-term population dynamics. More perplexing is the question of jurisdiction when a game population, due to mild weather, does not migrate off reservation in a given year but does move the next year. These problems highlight the defect in a "migration standard". Such a standard ignores the very long-term and ever fluid nature of managing a living resource. In Washington, as in other coastal states, major reservations are located on rivers in which anadromous fish runs migrate to and through its reservations, often supplemented by state plants of fish.

in reaching its preemption conclusion. The essence of the Tenth Circuit opinion was that the Mescalero Tribe had enacted a comprehensive scheme of fishing and hunting regulations and that this program was enhanced by extensive federal assistance. We will consider in order the New Mexico Enabling Act, the statutory basis of the preemption analysis, and the impact of federal developmental assistance.[6]

A. The Framework for Preemption Analysis.

This Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), held in part:

> ... [E]ven on reservations, state laws may be applied unless such application would interfere with reservation self government or would impair a right granted or reserved by federal law. [Citations omitted].

411 U.S. at 148. See also United States Department of the Interior, Handbook of Federal Indian Law, §13 (1958).

This general principle was clarified in *Bracker, supra*, in which the Court set forth the analytical framework for determining the question of preemption.

> This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but is called for a particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

448 U.S. at 145.

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[6] The Tenth Circuit decision also relied upon the treaty as a basis for a finding of preemption. As noted previously, this brief will not discuss that issue. We do, however, believe that New Mexico's position on the treaty issue is correct.

In spite of this command, the Tenth Circuit opinion on remand is, in fact, "dependent on mechanical or absolute conceptions of state or tribal sovereignty, . . ." *Bracker, supra.*

B. The New Mexico Enabling Act, 36 Stat. 557 (1910).

The first basis for the Tenth Circuit's finding of preemption is the disclaimer provision of the New Mexico Enabling Act. This provision is identical to Arizona's disclaimer clause. However, these disclaimer provisions relate only to a state's proprietary interest in Indian lands. These provisions do not serve as a predicate for an abandonment of state regulatory jurisdiction over non-Indian conduct on the reservation. *Organized Village of Kake v. Egan,* 369 U.S. 60, 67-69, (1972); *Jicarilla Apache Tribe v. United States,* 601 F.2d 1116 (10th Cir.), *cert. denied,* 444 U.S. 995 (1979); *Coville cirgarette case, supra;* and *White Mountain Apache Tribe v. State of Arizona, supra.*

C. The Indian Reorganization Act of 1934, 25 U.S.C. §461, et seq.

The preemptive effect of this statute, we believe, was clearly set forth by this Court in its decision in the *Coville* cigarette cases.

> Congress has manifested no intent whatsoever to delegate to tribes the far-reaching authority to preempt state fees and regulations otherwise applicable to non-Indians, nor would the opposite be inferred even from federal approval of the Indian taxing ordinances, or from the fact that the tribes exercise congressionally sanctioned powers of self government.

100 S.Ct. at 2082-83. See also *White Mountain Apache Tribe v. State of Arizona, supra.*

D. Public Law 83-280, 67 State. 588 (1953), as Amended, 18 U.S.C. §1162(b).

The purpose of P.L. 280 was to preserve federally granted rights of *Indians* to hunt and fish. *Metlakatla In-*

dian Community v. Egan, 369 U.S. 45, 57 (1962). However, under P.L. 280, states have retained their regulatory jurisdiction over non-Indians hunting and fishing on a reservation. *Fort Mohave Tribe v. County of San Bernadino*, 543 F.2d 1253, 1257 (9th Cir. 1976), and *White Mountain Apache Tribe v. State of Arizona, supra.*

E. General Federal Assistance.

While this Court has recognized a federal goal of promoting tribal self-sufficiency in economic development in *Bracker, supra*, it has also recognized that the tribes are not entitled to a specific guarantee of a share of a certain market *Coville* cigarette cases. However, if federal assistance alone is the controlling factor, almost every aspect of state regulation of non-Indian activity on a reservation would be preempted. Given the trustee relationship between the federal government and the tribe and the numerous federal economic assistance programs to the tribes, every aspect of non-Indian contact with an Indian reservation or tribe is encompassed within the context of these programs. We do not believe that federal assistance alone is the determinative factor. Clearly, this Court recognized such in its opinion in the *Coville* cigarette cases. There, this Court rejected the tribe's argument that the underlying federal policy of promoting economic self-sufficiency served as a basis for preempting Washington's cigarette tax.

The role of federal assistance in determining the preemption question must be viewed, we believe, in the context of the *Bracker* decision. The Court's opinion in *Bracker* cogently sets forth the totally exclusive federal scheme of management and regulation of the timber on Indian reservations. Indeed, not one tree may be cut, felled, sold, bartered, or taken from an Indian reservation without the express approval of the Secretary of the Interior.

Although the goal of the federal govenment in the game and fish area in assisting tribes is to aid them in developing a source of income, it falls woefully short of the comprehensive regulatory scheme that is imposed by the federal govenment on the timber resource. The federal government provides technical assistance in the area of game and fish management, and provides fish for stocking of reservation waters. That is the sum and substance of the federal participation in the game and fish program of an Indian reservation. There is no similar federal control over the number of fish that may be taken, the number of game that may be taken, or the seasons in which either may be taken. There is no federal control over the fees that may be charged by a tribe. We conclude that it is not federal assistance which is the weather vane for a finding of preemption. Rather, it is the degree to which the federal government has regulated the activity itself, the time in which it will take place, the manner in which it will take place, and the costs of the activity. When the *Bracker* standard is thus applied, it is clear that there has been no comprehensive federal regulatory scheme imposed upon the taking of fish or game on an Indian reservation.

V. The Tenth Circuit Erred in Concluding that New Mexico's Regulation of Non-Indian Hunting and Fishing Infringed Upon Tribal Self Government.

The facts in this case amply demonstrate that the Mescalero Apache Tribe has been able to enact is own regulations regarding non-Indian hunting and fishing. The state regulatory scheme has not impeded or interfered with the tribe's ability to function as a government making decisions about non-Indian hunting and fishing. What New Mexico and other states seek to do in a case of this nature was characterized by the Ninth Circuit in *Confederated Tribes of the Coville Indian Reservation v. Washington*, 591 F.2d 89 (9th Cir. 1979), when the Court stated:

> The only authority claimed by the state is to impose upon non-Indians who wish to fish upon the reservation its licensing requirements and such of its statutes and regulations as imposed restrictions equal to or more restrictive than those that the tribes apply to both Indians and non-Indians who fish on the reservation. The state does not claim that it can authorize fishing or fishing practices by non-Indians on the reservation that are prohibited by the tribes' regulations.

591 F.2d at 92.[7]

The effect of conflicting regulations only limits the tribe's ability to raise money "if non-Indians will not risk the violation of state law". *White Mountain Apache Tribe v. State of Arizona, supra* at 1283. Indeed, this reduction of money flowing into tribal coffers, " . . . as in the dual taxation system makes the tribal interest not overly weighty". *White Mountain Apache Tribe v. State of Arizona,* 649 F.2d at 1283.

The facts in this case underscore the weakness of the tribe's claim of economic injury. The increase in the number of people fishing on the reservation and the increase in tribal revenues clearly demonstrate the absence of any economic injury to the tribe.

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[7] It is noteworthy that the Coville Reservation is the only one of Washington's twenty-four in which there has been a challenge to Washington's jurisdiction over non-Indian fishing and hunting. The action was settled and dismissed by a state-tribal agreement that the tribe would not interfere with Washington's exercise of such jurisdiction. The agreement, however, is not the basis for Washington's jurisdictional authority.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the decision of the Tenth Circuit on remand should be reversed by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Steven J. Silver, Special Assistant Attorney General for the State of Arizona, do hereby certify that three copies of the foregoing Brief of Amici Curiae of the State of Arizona, Arizona Game and Fish Commission, and the State of Washington Department of Game were served upon each of the following by mailing the same, postage prepaid, this 13th day of January, 1983, all in accordance with the Rules of this Court:

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